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No. 21,465

IN THE

United States Court of Appeals

For the Ninth Circuit

MARTHA G. WHITFIELD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Order of the United States District Court for the Eastern District of California Refusing to Correct or Reduce Sentence

REPLY BRIEF FOR THE APPELLANT

LUCIUS POWERS,
CLAUDE L. ROWE,
910 Security Bank Building,
Fresno, California 93721,
Attorneys for Appellant.

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Subject Index

II

III

IV

V

Table of Authorities Cited

Cases

Rules

Texts

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ARGUMENT

I

THE DECISION OF THIS COURT IN WHITFIELD v. UNITED STATES, 383 FED. 2d 142 (1967) HOLDING THAT INTERNAL REVENUE AGENTS NEED NOT WARN TAXPAYERS THEY WERE ENTITLED TO COUNSEL BEFORE INTERROGATION AND UPON WHICH THE TRIAL JUDGE BASED HIS DECISIONS REFUSING TO CORRECT AND REDUCE DEFENDANT'S SENTENCE WAS OVERRULED BY THE SUPREME COURT OF THE UNITED STATES MAY 6, 1968.

1. The Trial Court in Denying Appellant's Motion to Correct and Reduce Her Sentence Relied on the Decisions of This Court in Whitfield v. United States, 383 Fed. 2d 142 (1967) Holding That an Internal Revenue Agent Need Not Warn the Taxpayer of Her Right to Counsel Before Interrogation.

Both the Government and the Trial Court relied on *Whitfield v. United States,* 383 Fed. 2d 142 (1967) in

making their decision refusing to correct and reduce plaintiff's sentence as the record clearly shows, which case held that the plaintiff need not be advised of her right to counsel.

2. The Internal Revenue Agent Did Not Warn Plaintiff of Her Right to Counsel Before Interrogation.

The Government investigator stated that he read the following statement to defendant (appellant herein) before interrogating her in her motel office.

> "A. Well, I told her that according to the federal laws of these United States, 'you cannot be required to furnish any information that may incriminate you in any way' and I told her, 'It is my duty to warn you that in the event that any action is taken against you in a Federal Court that any information or documents you furnish can be used against you in any such proceedings' and then I advised her that she could refuse to answer any or all the questions that I was about to ask her." (R.T. 72, lines 3-11.)

> "The Government admits that its agent did not advise appellant of her right to have counsel in attendance during the interrogation * * * failure to include information as to right of counsel affords appellant no basis for relief." (*Whitfield v. U.S.,* 383 Fed. 2d 142, 143 (1967).)

As shown by the testimony and decision above there was no warning that she had the right to counsel given by this agent to this elderly widow, the defendant, before interrogating her alone in her office.

3. The Supreme Court of the United States on May 6th of This Year Held a Revenue Agent Must Warn the Taxpayer of His Right to Counsel Thus Overruling Whitfield v. United States, 383 Fed. 2d 142 (1967).

"It is true that 'a routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. * * *" (page 3 of opinion in *Mathis v. United States,* No. 726, October Term, 1967, May 6, 1968.)

"We reject the idea that tax investigators are immune from the Miranda requirements for warnings to be given to a person in custody." (*Mathis v. U. S.,* supra.)

Thus holding that both the *Escobedo* and the *Miranda* cases applied to internal revenue agents interrogating taxpayers.

4. The Supreme Court Has Held That Escobedo Applies Only to Trials Held After June 22, 1964.

The Supreme Court of the United States has recently held that the *Escobedo* case applies only to trials after June 22, 1964.

"In this case we are called upon to decide whether *Escobedo v. State of Illinois,* 378 U.S. 478, 84a S. Ct. 1758, 12 L.E. 2d 977 (1964) and *Miranda v. State of Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.E. 2d 694 should be applied retroactively. We hold that *Escobedo* affects only those cases in which the trial began after 1964, the date of that decision. We hold that *Miranda*

applies only to cases in which the trial began after the date of our decision one week ago (Sec. 1966)." (*Johnson v. State of New Jersey,* 384 U.S. 723, 86 S. Ct. 1772, 1775 (1966).)

"We held that *Escobedo* affects only those cases in which the trial began after June 22, 1964." (*Johnson v. State of New Jersey,* 384 U.S. 723, 86 S. Ct. 1772 (1966).)

"Because *Escobedo* is to be applied prospectively this holding is available only to persons whose trials began after June 22, 1964, the date on which *Escobedo* was decided." (*Johnson v. State of New Jersey,* 384 U.S. 735, 86 S. Ct. 1772, 1781 (1966).)

5. However, Here the Defendant's Trial in This Case Began and Was Finished in 1965.

The defendant's trial in this case was held in 1965 and she was sentenced in 1965, thus making the *Escobedo* case applicable.

"Appellant was sentenced December 6, 1965." (*Whitfield v. United States,* 383 Fed. 2d 142, 144 (1967).)

6. The Fact That Plaintiff Was Not in Custody in This Case When Interrogated Is Immaterial.

Clearly there is no distinction between the plaintiff being in custody and this elderly widow being confronted alone by several revenue agents in her office in her motel as stated above and without advice. The revenue agents demanded and stayed until the defendant produced all of her motel records, which they copied and made notes from and who answered ques-

tions propounded by them without being warned of her right to counsel. Such confrontation and undue influence coupled with their threat she was being investigated criminally as effectively "deprived her of her freedom in a significant way" as being in actual custody and made the reasoning of the *Escobedo* case which we quote applicable to her situation.

> "We hold that where an individual is taken into custody or deprived of his *freedom in any significant way* * * * he must be warned of * * * that he has the right to the presence of an attorney and that if he cannot afford an attorney, one will be appointed by him prior to any questioning if he so desires." (*Miranda v. U.S.*, 384 U.S. 436, 86 S. Ct. 1607, 1612 (1966).)

Also see *Johnson v. State of New Jersey,* 384 U.S. 735, 86 S. Ct. 1772, 1781 (1966) where psychology, theatrics, intimidation, show of force, use of threatening expressions on the interrogator's face, show of authority and intimidations that a suspect must answer interrogatories are the same as using force or confinement.

II

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR ON STATING THAT BECAUSE THE DEFENDANT DID NOT PLEAD GUILTY OR AT LEAST ADMIT SHE "HAD DONE SOMETHING WRONG" BEFORE SENTENCE SHE WAS NOT ENTITLED TO PROBATION.

1. The Trial Judge Denied Probation to This Defendant Because She Did Not Plead Guilty or Admit She Had Done Something Wrong Before Sentence.

This clearly appears from the statement of the trial judge at page 7 of the Government's Brief. We quote:

> "The Court: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here and, of course, that the probation officer's point, that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate, so there isn't anything he can do and, further, probation has to be based upon trust and confidence and if she won't tell the truth to the probation officer to the court, then there's no basis for probation." (Appellee's Brief, page 7). (R.T. 12.)

In other words, the trial judge clearly stated that unless appellant admitted her guilt before sentence she was not legally entitled to probation. This is not a matter of discretion, but is an erroneous statement of the law and is clearly a reversible error.

In other words, the trial judge insisted that appellant would have to abandon her right to appeal to this court by admitting "she had done something wrong" (that is, that she was guilty), before sentence. This would, of course, have destroyed her right

to appeal. Such a position is unheard of, it is clearly erroneous, and constitutes a reversible abuse of discretion.

There is no legal distinction between this case where the trial judge insisted that defendant throw away her constitutional right to appeal to this court by "admitting she had done something wrong" and the case where the trial court refused defendant's probation because the defendant refused to plead guilty and stood trial as was the case in *United States v. Wiley,* 278 Fed. 2d 500. We quote:

> "The trial judge announced from the bench that it was the standard policy in his court that once the plaintiff stands trial *probation for such defendant would not be considered.* (Italics ours.) It is contrary to the statute and the rule of Criminal Procedure authorizing probation, such a rule should not be followed." (*U.S. v. Wiley,* 278 Fed. 2d 500, C.C.A. 7th Cir. 1960.)

The case of *Bryson v. U.S.,* 265 Fed. 2d 9, cited by counsel for appellee, is not in point. The right to probation is part of the sentence and a right given to defendants in criminal cases by law. The trial judge may grant or deny probation as a matter of discretion, but he cannot change the law by adding to the law the erroneous additional provision that no defendant is entitled to probation unless he admits his guilt before sentence, and thus waive his right to appeal to this court. The attempt of the trial judge to add such an illegal condition to an application for probation constitutes an abuse of discretion whether

you consider it a right or a privilege. It is impossible to distinguish the present case where the trial judge insisted that the defendant plead guilty and the case of *U.S. v. Wiley,* 278 Fed. 2d 500, C.C.A. 7th Cir. (1960) where the trial judge held that a defendant must plead guilty and give up his right to a trial or he would forfeit his right to ask for probation. We quote from this case:

> "The trial judge announced from the bench that it was the standard policy in his court that once the plaintiff stands trial *probation for such defendant would not be considered.* (Italics ours.) It is contrary to the statute and the rule of Criminal Procedure authorizing probation, such a rule should not be followed." (*U.S. v. Wiley,* 278 Fed. 2d 500, C.C.A. 7th Cir. 1960.)

To hold that the trial judge had the right to refuse to grant probation solely on the grounds that defendant failed to plead guilty before sentence was an unenforceable privilege would be like saying a trial judge could add to the probation act of Congress a condition that there will be no probation granted when the defendant is a Negro. In the above discussion we assume a valid conviction but an illegal sentence.

2. Counsel for Appellee Is in Error When He States That Appellant Asks This Court of Appeals to Correct or Reduce Defendant's Sentence.

Counsel for appellee at page 8 of Brief for Appellee erroneously states that we are asking *this court* to reduce or modify appellant's sentence.

We are familiar with the law that correcting or reducing a sentence is the province of the *trial judge.* All we request is to ask this court to vacate the sentence of appellant and remand this case to the trial court with instructions that the appellant need not admit her guilt or that she had "done something wrong" before sentence which is only another way of saying she is guilty before she is entitled to probation. We quote from page 13 of our Appellant's Opening Brief:

> "This court should reverse the order of the District Court and remand the case to the District Court with clear instructions that appellant has a constitutional and statutory right to ask for probation without first either changing her plea to guilty, 'admitting that she had done something wrong,' or waiving her right to appeal her conviction to this court." (Page 13, Appellant's Opening Brief.)

We have only asked that this court *vacate and remand the case to the trial court* with instruction that probation does not depend on an admission of guilt before sentence and that defendant's refusal to admit her guilt before sentence and before taking her appeal does not give a trial judge the right to deny probation any more than the fact that defendant pleads not guilty and stands trial gives the trial judge the right to deny probation after trial as ruled in the following case:

> "District Court's order judgment vacated and remanded for further proceedings not inconsistent with this opinion. The sentence is vacated

and the case remanded to the District Court for further proceedings not inconsistent with this opinion." (*Thomas v. U.S.,* 368 Fed. 2d 941, C.C.A. 5th Cir. 1966.)

III

APPELLEE'S CONTENTION THAT EVIDENCE DE HORS THE RECORD CANNOT BE CONSIDERED ON A MOTION TO CORRECT OR AMEND SENTENCE UNDER RULE 35 IS WRONG.

Counsel for appellee at page 9 of his brief states that the affidavits filed by defendant may not be considered by the trial judge. That is not the law. The appellant contends that untrue evidence was used by the prosecution at the trial and that the prosecution knew or should have known it was untrue. This was true as stated in Appellant's Opening Brief in the bank teller Shirley Collins' testimony, who testified for the Government and in the calculations of the earnings of defendant's husband by Government witnesses. (R.T. 216; R.T. 519, lines 1-21.) In such a case testimony de hors the record may be introduced in a motion under Rule 35, Federal Rules of Criminal Procedure.

> "Grounds that have been recognized in the cases for a motion to correct, vacate, or set aside a judgment include the following: double sentence or punishment, coercion into pleading guilty, the use of perjured testimony. The deliberate suppression by the prosecution of evidence favorable to the plaintiff may constitute a denial of due

process so as to be grounds for the statutory motion." (50.139 Cyc. Fed. Procedure.)

"The requirement for due process cannot be deemed to be satisfied if a state has contrived a conviction through the pretense of a trial which in truth is used as a means of depriving a defendant of liberty through deliberate deception of court and jury." (*Mooney v. Hogan,* 294 U.S. 103, 55 S. Ct. 34, article 342.)

Moreover, the Supreme Court has held that the question of admission of evidence de hors the record in a Rule 35 case is still undecided and open in that court.

"Whether Rule 35 covers the broader field of collateral attach, where a hearing to consider matters de hors the record we do not here determine." (*Heflin v. U.S.,* 358 U.S. 415, 422, 79 S. Ct. 451 at 453, Justice Douglas' footnote 7, 1963, 3 L.E. 2d 407.)

IV

OTHER ERRONEOUS STATEMENTS IN DEFENDANT'S BRIEF COMMENTED UPON.

1. The Counsel for the Government Erroneously Contends That Defendant Here Cannot Seek Relief Under Rule 35 F.R.C.P. Because She Is Not in Custody.

In the first place, counsel for the Government's facts are wrong. Defendant was arrested and released on bail. She is clearly "in custody." *Turner v. Wilson,* 49 Ind. 581, 585; *Levy v. Arnsthal,* 10 Grant 641, 648 (Va.).

Secondly, there is no provision in Rule 35, Federal Rules of Criminal Procedure, that defendant must

be in custody to make a motion to correct sentence under Rule 35. Rule 35, Federal Rules of Criminal Procedure, provides that "The Court may correct a sentence at any time."

Finally, the authorities of appellee are not in point as they deal with Section 2255, Title 28 U.S.C.A., not Rule 35, F.R.C.P. The case of *Redfield v. U.S.,* 315 Fed. 2d 2681, is not in point as it dealt with Title 18, Section 2255. We quote:

> "Section 2255 may be involved only by those claiming the right to be released." (*Redfield v. U.S.,* 315 Fed. 2d 76, 81.)

Migdol v. U.S., 298 Fed. 2d 513, 515 (1961), cited by appellee, was also not in point since it deals with paragraph 2255, Title 18. We quote:

> "It is now well settled that paragraph 2255, Title 18 U.S.C. is available only to attack a sentence under which a prisoner is in custody. Heflin v. U.S. 358 U.S. 415; 79 S. Ct. 451; *Miller* v. U.S. 9th Cir., 256 Fed. 2d 501." (*Migdol v. U.S.,* 298 Fed. 2d 513, 515, 1961.)

Neither is *Hefflin v. U.S.,* 94 S. Ct. 451, since it also refers to section 2255, Title 18 (*Hefflin v. U.S.,* 79 S. Ct. 452, footnote 4).

V

CONCLUSION

It is submitted that the sentence in this case should be vacated and remanded to the trial court on the

following grounds: (1) That the trial court committed reversible error in refusing to consider probation because the defendant would not admit her guilt before sentence and thus waived her right to appeal. (2) That the trial court erroneously refused to consider evidence de hors the record to show untrue testimony was used by the prosecution which they knew or should have known was false, and (3) That defendant was not warned of her constitutional rights to counsel before interrogation by the internal revenue agents.

Dated, Fresno, California,
May 17, 1968.

Respectfully submitted,
LUCIUS POWERS,
CLAUDE L. ROWE,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLAUDE L. ROWE,
Attorney for Appellant.